

OPEN AND GROSS LEWDNESS AND LASCIVIOUS BEHAVIOR

The defendant is charged with open and gross lewdness and lascivious behavior. Section 16 of chapter 272 of our General Laws provides as follows:

**“A man or woman, married or unmarried,
who is guilty of open and gross lewdness
and lascivious behavior,
shall be punished”**

In order to prove the defendant guilty of this offense, the Commonwealth must prove five things beyond a reasonable doubt:

First: That the defendant exposed his (her) (genitals) (buttocks) (or) (female breasts) to one or more persons;

Second: That the defendant did so intentionally;

In a prosecution for intentional exposure to a single person in a private setting, the following element may be rephrased by deleting the word “public” and replacing the word “others” with “another person.”

Third: That the defendant did so “openly,” that is, either he (she) intended public exposure, or he (she) recklessly disregarded a substantial

risk of public exposure, to others who might be offended by such conduct;

***Fourth:* That the defendant's act was done in such a way as to produce alarm or shock; and**

***Fifth:* That one or more persons were in fact alarmed or shocked by the defendant's thus exposing himself (herself).**

Commonwealth v. Fitta, 391 Mass. 394, 395-397, 461 N.E.2d 820, 822-823 (1984) (defendant exposing himself to 10-year-old boys) (offense is not unconstitutionally vague; it is closely similar to indecent exposure with additional element that done in such a way as to produce alarm or shock; any overlap between two offenses is not constitutionally invalid); *Commonwealth v. Adams*, 389 Mass. 265, 272, 450 N.E.2d 149, 153 (1983) (masturbating in a public place "certainly falls within the common understanding" of the offense); *Commonwealth v. Sefranka*, 382 Mass. 108, 116, 414 N.E.2d 602, 607 (1980) (offense is primarily applied to indecent exposure in front of and sexual conduct with children); *Commonwealth v. Dickinson*, 348 Mass. 767, 767-768, 202 N.E.2d 240, 240 (1964) (defendant asked directions from another while openly masturbating in auto); *Commonwealth v. Lucas*, 332 Mass. 594, 595-596, 600, 126 N.E.2d 804, 805-806, 808 (1955) (father sexually abused his minor daughter while alone together in own home); *Commonwealth v. Cummings*, 273 Mass. 229, 231-232, 173 N.E. 506, 507 (1930) (consensual homosexual conduct in public toilet) (ineffective attempts at concealment do not prevent act being "open" if committed in a place where there can be no real privacy); *Commonwealth v. Wardell*, 128 Mass. 52, 53-54 (1880) (salesman exposed himself in private home to minor children) (requirement that act be "open" refers to defendant's intent that act be seen by one or more unwilling persons present and does not require that it be done in a public place); *Commonwealth v. Catlin*, 1 Mass. 8, 10 (1804) (statute inapplicable to sexual acts reasonably expected to be private but accidentally observed through broken window).

The statute prohibits the imposition of lewdness or nudity on an unsuspecting or unwilling person, and cannot be applied to expressive conduct that is offered to a willing audience and that falls within the ambit of the First Amendment (which does not include legally obscene acts). *Revere v. Aucella*, 369 Mass. 138, 142-143, 338 N.E.2d 816, 819, appeal dismissed sub nom. *Charger Invs., Inc. v. Corbett*, 429 U.S. 877 (1976) (nude dancer in bar); *P.B.I.C., Inc. v. Byrne*, 313 F.Supp. 757 (D. Mass. 1970), vacated to consider mootness, 401 U.S. 987 (1971) (stage production of *Hair*). Compare *Commonwealth v. Kocinski*, 11 Mass. App. Ct. 120, 122-123, 414 N.E.2d 378, 380-381 (1981) (nude dancing involving hard-core sexual act can be punished as obscene matter under G.L. c. 272, § 29).

SUPPLEMENTAL INSTRUCTION

If the evidence involves exposure to a child, the model instruction may be concluded with the following language:

If the Commonwealth has proved beyond a reasonable doubt that the defendant intentionally, indecently and offensively exposed himself (herself) to a child of tender years, without necessity or reasonable excuse, and in such a way as to produce alarm, then you may find the defendant guilty of this offense.

Fitta, 391 Mass. at 396, 461 N.E.2d at 822; *Wardell*, *supra*.

NOTES:

1. **Elements; constitutionality.** The criminal prohibition of open and gross lewdness (G.L. c. 272, § 16), as limited by prior decisions, is facially constitutional. *Revere v. Aucella*, 369 Mass. 138, 338 N.E.2d 816 (1975), appeal dismissed sub nom. *Charger Invs., Inc. v. Corbett*, 429 U.S. 877 (1976), held that § 16 may be applied to a public display of lewdness and nudity only if imposed upon an unsuspecting or unwilling audience. *Commonwealth v. Kessler*, 442 Mass. 770, 817 N.E.2d 711 (2004), held that the display of nudity must be intentional, done in a manner to produce alarm or shock, and must actually produce alarm or shock that is a "serious negative emotional experience," and not just "nervousness and offense." Thus, the elements of the offense are that "(1) the defendant exposed his or her genitals, buttocks, or breasts to one or more persons; (2) the defendant did so intentionally; (3) the defendant did so 'openly,' that is, either the defendant intended public exposure or recklessly disregarded a substantial risk of public exposure to others who might be offended by such conduct; (4) the defendant's act was done in such a way as to produce alarm or shock; and (5) one or more persons were in fact alarmed or shocked by the defendant's exposure." The alarm and shock caused must be a "serious negative emotional experience," stronger than mere "nervousness and offense." As a felony, it "is thus a much more serious offense than the misdemeanor of indecent exposure, G. L. c. 272, § 53, and consequently requires a substantially more serious and negative impact as a result of the behavior." *Commonwealth v. Ora*, 451 Mass. 125, 127, 883 N.E.2d 1217, 1221 (2008).

2. **"Buttocks" or "female breasts."** Open and gross lewdness is not limited to exposure of the genitals, and may include exposure of the "buttocks" or "female breasts." *Commonwealth v. Quinn*, 439 Mass. 492, 501, 789 N.E.2d 138, 146 (2003); *Commonwealth v. Ora*, *supra*.

3. **Eyewitness testimony.** There is no requirement that the Commonwealth must prove the exposure element solely through the victim's eyewitness testimony. *Commonwealth v. Poillucci*, 46 Mass. App. Ct. 300, 303

n.3, 705 N.E.2d, 626, 629 n.3 (1999).

4. **Indecent exposure is lesser included offense.** Indecent exposure (G.L. c. 272, § 53) is a lesser included offense of open and gross lewdness (G.L. c. 272, § 16). *Commonwealth v. Alvin B. Fields*, 71 Mass. App. Ct. 1116, 883 N.E.2d 343, 2008 WL 859686 (No. 07-P-895, Apr. 1, 2008) (unpublished opinion under Appeals Court Rule 1:28). However, indecent exposure may be used to prosecute only exposure of the genitals and not exposure of non-genital pubic areas. *Commonwealth v. Arthur*, 420 Mass. 535, 650 N.E.2d 787 (1995).

5. **Single penalty for one act with multiple victims.** Where there is a single incident of open and gross lewdness resulting in shock and alarm to more than one person, the legislature intended that only a single penalty attach to the conduct. For double jeopardy purposes, the “unit of prosecution” is conduct-based, not victim-based. *Commonwealth v. Botev*, 79 Mass. App. Ct. 281, ___ N.E.2d ___ (2011).